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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932

No. 3

AMERICAN SURETY CO., PETITIONER,

vs.

VIVIAN F. BALDWIN ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO.

No. 21

VIVIAN F. BALDWIN ET AL., PETITIONERS,

vs.

AMERICAN SURETY CO.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

REPLY BRIEF OF VIVIAN F. BALDWIN ET AL.

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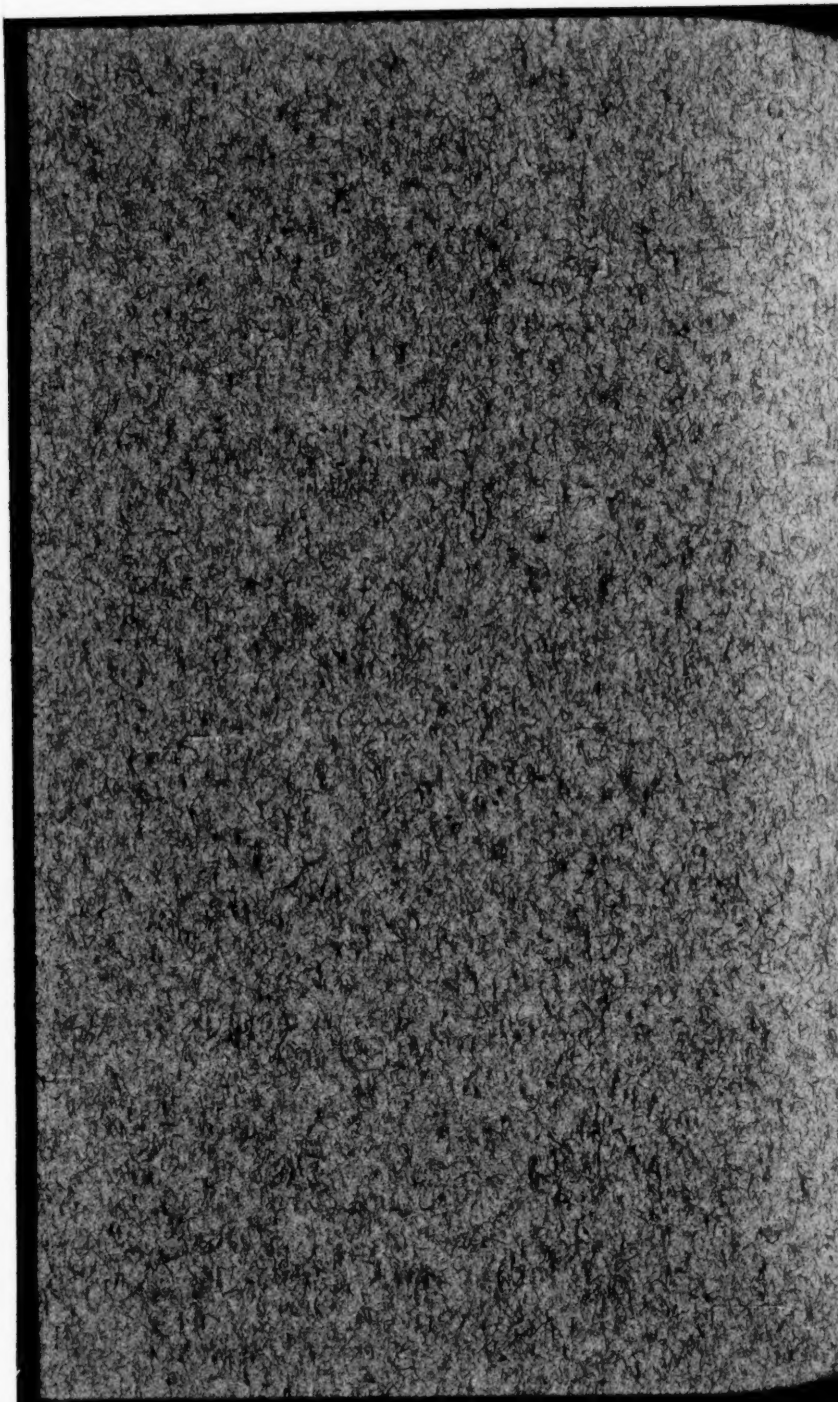

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The brief for American Surety Company was not served upon us until October 8th and as a result, by

reason of the date of hearing, it will be impossible to more than briefly, and perhaps somewhat superficially, review the same.

The Surety Company's brief has been prepared by Eastern counsel who did not participate in any of the proceedings herein until the application for extension of time in which to file their petition for writ of certiorari was made to Mr. Justice Brandeis August 27, 1931 (No. 3, R. 119), which perhaps explains certain erroneous statements of fact contained in the brief for the American Surety Company.*

While we do not believe the inferences and innuendoes directed by counsel for the Surety Company at the Baldwins and their counsel have any (direct or indirect) bearing upon the questions of law before this Honorable Court, we nevertheless beg indulgence in correcting certain patent errors submitted by the Surety Company, to the end that the court may have a fair presentation of the cause.

Upon page 2 of their brief, counsel say:

> "On May 31, 1928, an Idaho court rendered judgment in favor of the Baldwins (for $19,500 damages and $73.70 costs for an automobile collision) against the Singer Company and Ed Anderson (R. 2); from 'the whole' of which judgment they both appealed (R. 3, 12, 13)."

The facts being that *no costs were taxed* (No. 21, R. 33) and although counsel use the term "both ap-

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*Also in the Surety Company's petition for certiorari and in its brief in opposition to the petition for certiorari of Vivian F. Baldwin et al.

pealed", the record shows that the defendants, Singer Company and Ed Anderson, appealed jointly (not jointly and severally) as disclosed by the notice of appeal, a portion of which is quoted as follows:

> "You and each of you will please take notice, that the defendants, Singer Sewing Machine Company, a corporation, and Ed Anderson, hereby appeal to the Supreme Court of the State of Idaho, from that certain judgment entered in the above-entitled action on the 31st day of May, 1928, * * *."

The question of costs is mentioned for the reason that the undertaking under consideration prepared by the Surety Company (No. 21, R. 19) erroneously refers to the judgment as being in the sum of $19,573.70 and which we refer to solely because it demonstrates one of the many inaccuracies contained not only in the Surety Company's brief but in the supersedeas under consideration.

Upon page 4 of their brief, counsel say "This left the Baldwins with nothing but a worthless judgment for $19,500 against the insolvent Ed Anderson". There is nothing whatever in the record by way of affidavit, unsatisfied execution, or otherwise, supporting or tending to support this statement, the fact being as the record demonstrates, that the Baldwins accepted the supersedeas in good faith and *have never, at any time since signing the acceptance of said bond, the 29th day of August,* 1928, *issued execution or otherwise endeavored to collect the judgment until after its partial affirmance by the Supreme Court of Idaho.*

At the bottom of page 4, counsel further say, after referring to certain portions of the bond into which have been inserted the words "Singer Company" in parenthesis:

> "That did not mean that the Singer Company thereby agreed to pay the judgment against *Anderson*, but only the judgment against *itself*. The Surety Company's obligation was only to pay what its principal, Singer Company, was obliged to pay."

This statement of counsel and the portion immediately preceding, demonstrates, we believe, first, that even the Surety Company must write into the bond (by use of the words "Singer Company"), that which does not appear in the original bond as filed and passed upon by the Supreme Court of Idaho. Secondly, it loses sight of the fact that *at the time the bond was executed, accepted and filed, there was no separate judgment against Anderson or against the Singer Company but a single, indivisible, joint judgment against both.* Thirdly, the contention that the Surety Company's obligation was only to pay what its principal, Singer Company, was obliged to pay, is answered by the decision of the Supreme Court of Idaho when, in passing upon this question, it construed its own State statute and said:

> "It is claimed by respondent that these authorities are not in point because the legal effect of an undertaking is the same as that of a bond in that the party executing the undertaking is simply surety for a principal; that in this case the introductory recitals of the undertaking dis-

close that the principal is the Singer Sewing Machine Company, and that upon the action being dismissed as to it such dismissal was also a dismissal as to the Surety Company. *We cannot accept this view.* The undertaking is a complete independent contract. The obligation of its maker is not collateral or secondary. *Moffat* v. *Greenawalt* (Cal.), 27 Pac. 296" (Emphasis ours).

Lastly, the Baldwins would certainly not be bound by the "decision" of the Surety Company as to its liability, hence the necessity for a *judicial determination,* which in the case at bar, was rendered by the only court under the statutes and constitution of Idaho having jurisdiction to entertain and determine the matter.

Upon page 5, counsel, as elsewhere in their brief, have repeatedly and persistently referred to the *ex parte* judgment. We believe it does not require further citation of authority to distinguish between *summary* judgments which are the result of *inter parte* proceedings and *ex parte* proceedings which are by one party alone, the adverse party not being in court. The authorities, we believe, fully support our contention that the judgment here under consideration was entered upon summary proceedings and was *not* an *ex parte* judgment.

Commencing upon page 6, under the heading of "Events of June 3, 1930," several pages are devoted to a (rather severe) criticism of Mr. Ailshie's handling of the proceedings, leading up to the entry of judgment. Referring to the record, page 180 (No. 21), it will be noted that in response to an affidavit of Mc-

Keen F. Morrow which stated that Mr. Ailshie had said to the affiant that he waited until J. F. Martin left the court room, which affidavit was wholly erroneous, Mr. Ailshie made affidavit to the effect that said J. F. Martin was presenting a matter to the court at the time he entered the court room, that necessarily Mr. Ailshie waited until Mr. Martin was through and then stepped to the bench, not (to quote counsel for the Surety Company) "unobtrusively if not secretly" but openly and in the ordinary course of court proceedings, for the reason, as stated in the certificate of Judge Koelsch (No. 21, R. 106) that Mr. Ailshie was not only moving for judgment but was also submitting "a form of judgment, together with the complete records and files in said cause including the opinion of the Supreme Court of the State of Idaho * * *."

In passing, we cannot but comment upon the apparent unfairness of referring to counsel's action as "certainly unobtrusively if not secretly" stepping to the bench, when it was physically impossible to submit the form of judgment, together with the records and files to the court without stepping to the bench for the purpose of handing the same to the trial judge.

The last note on page 7 opens with the statement:

> "Mr. Ailshie overlooked the obvious fact that the Singer Company, Mr. Martin's client, would be liable over as indemnitor of its surety or by subrogation * * *."

Here again counsel pursue the theory of principal and surety rather than the rule of primary obligation, adopted not only by Idaho but also by the many states

and decisions referred to and cited upon page 12 of the brief of the petitioners, Baldwin (No. 21). In this connection it is significant that at no time or place in the many and varied proceedings had in the course of this litigation, or in the long records and voluminous briefs before this Court, has the *Singer Sewing Machine Company ever contended that it secured the execution of the bond in question.* While counsel for the Surety Company have gone far afield in their statement of facts, such action properly gives us no right to discuss matters dehors the record; however it is a matter of common knowledge that operating corporations almost universally carry public liability insurance covering themselves and their employees, for negligence resulting in personal injury. With this in mind, it is not difficult to reason why the Singer Sewing Machine Company has seen fit to remain silent as to whether or not *it* obtained the bond in question.

With further reference to the term "smiled inwardly" as part of an affidavit made by Mr. Ailshie, appearing upon pages 180 to 183 of the record (No. 21), in which it is stated that in the course of a "casual conversation" with Mr. Morrow the statement contained in counsel's brief was made, which statement was part of an informal conversation resulting from certain personal matters with which we will not burden this Honorable Court, for it conclusively appears both from the certificate and affidavit of the trial judge and the affidavit of counsel that neither the court or

counsel knew whether Mr. Martin was present when the motion was made or attached any importance to it. To dwell upon and point out the many of the additional inaccuracies would serve only to unnecessarily extend this reply and thereby greatly impose upon the Court, and we shall therefore confine our discussion to only a few of the more glaring matters.

At the bottom of page 9, counsel after referring to the entry of judgment on June 23, 1930, said "the next morning, June 24, 1930," Mr. Ailshie gave notice to the Surety Company of the entry of judgment. On page 98 of the record (No. 21) it appears (and is nowhere disputed) that at the time motion was made for judgment all of the records and files of the court were submitted to Judge Koelsch, together with certain citations, one being 22 Fed. (2d 369, and *Wood* v. *Orford*, 56 Calif. 157, and it further appears without contradiction, on page 182 of the record (No. 21), that immediately after the entry of judgment on June 23d and on the same day Mr. Ailshie went to the office of Messrs. Richards & Haga who had signed the supersedeas on behalf of the American Surety Company and advised them that a judgment had been entered and an execution had been issued and then and at that time delivered a copy of the judgment to Mr. McKeen F. Morrow of said firm and at his request furnished him with a copy of the undertaking. In this connection we call attention to the opinion of Judge McNaughton of the Supreme Court of Idaho (21, R. 56), where it is said:

> "We think, regardless of what our construction of the bond might be, it cannot be said ap-

pellants had no right to submit the question, nor can it be said that such submission was a fraud upon the court and upon that ground its judgment was void."

Further, in this connection, we call attention to the memorandum opinion of Judge Cavanah, wherein he says:

"* * * the only remaining question is: Whether the judgment was obtained by fraud, accident or mistake unmixed with any fault or negligence of the plaintiff. The record seems to be silent as to any fact going to show that fraud was perpetrated upon the court in obtaining the rendition of the judgment. The allegation in the bill as to the obtaining of the judgment by fraudulent means is a conclusion and not a statement of fact showing what the fraudulent acts were. A bill for relief on the ground of fraud must be specific, and the facts constituting it must be stated, however the showing presented does not establish any fraud of the conduct of counsel for defendants when he moved in open court the entry of the judgment or thereafter, for it appears that he appeared in open court when the Judge was on the Bench and moved under the statute the entry of the judgment and tendered form of judgment to the Judge who after requiring authorities to be presented took the matter under advisement and thereafter entered the judgment, while there appears a sharp conflict between counsel as to whether the bond only secured the liability of the Sewing Machine Company, whom plaintiff asserts was the only principal in the bond for which it was surety, yet all the facts fall far short in establishing fraudulent con-

> duct of counsel in obtaining the rendition of the judgment" (No. 21, R. 190).

And finally the trial judge, Hon. Chas. F. Koelsch, made affidavit as follows:

> "I further state that no fraud was practiced upon the said District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, or myself, as one of the judges thereof, in the making of motion for judgment against the American Surety Company of New York, on the 23d day of June, 1930, or in obtaining my order granting the said motion, or in the entry of said judgment" (No. 21, R. 136).

In addition to the foregoing, the record discloses that in the injunction proceedings, in the Federal court the Baldwins moved to strike from the bill of complaint all of the allegations of fraud (21, R. 46), which motion was granted by Federal Judge Cavanah (21, R. 193) and which order *was not disturbed by the Circuit Court of Appeals and as the matter now stands all allegations of fraud contained in the bill are stricken* (No. 21, R. 264).

On page 13, counsel states:

> "On July 6, 1931 (shortly after the Supreme Court of Idaho had reversed Judge Koelsch and reinstated the June 23rd judgment), the Surety Company filed its bill in equity in the Federal Court of Idaho to enjoin the Baldwins from enforcing the *ex parte* judgment * * *."

Prior to that date it will be remembered that the Surety Company had voluntarily submitted to the

jurisdiction of the said trial court (on June 26, 1930), and moved the court to set aside the judgment upon *non-jurisdictional* as well as jurisdictional grounds and on the date of filing the bill the Surety Company also had pending in the State court a motion to amend, correct and vacate the judgment of June 23rd, which appeal was taken in July. The motion for temporary injunction together with the motions of the Baldwins addressed to the bill were heard in Federal Court, July 28, 1931, at which time the Surety Company had pending in the State Supreme Court the following:

An appeal from an order denying it's motion to amend, correct and vacate the judgment,
(and)
A direct appeal from the judgment.

Thereafter application was made by the Surety Company to Mr. Justice Brandeis, on August 27th for an order extending time to October 1, 1931, in which to file a petition for writ of certiorari to the Supreme Court of Idaho, which was not served on the Baldwins or their counsel and of which they had no knowledge until November 6, 1931, when the petition and record were served. (Records of the Clerk, U. S. Sup. Ct.)

At the time the application was made to Mr. Justice Brandeis the Surety Company had pending the following:

(1) A direct appeal to the Supreme Court of Idaho taken July 13, 1931, from the judgment of June 23, 1930 (No. 21, R. 122).

(2) An appeal to the Supreme Court of Idaho taken July 14, 1931, from an order denying it's

motion to correct, amend and vacate (No. 21, R. 26).

(3) An appeal to the U. S. Circuit Court of Appeals for the Ninth Circuit taken Aug. 5, 1931, from Judge Cavanah's decree denying the temporary injunction and dismissing the bill (No. 21, R. 202-207).

(4) An injunction issued out of the U. S. Circuit Court of Appeals for the Ninth Circuit, on the 14th day of August, 1931, enjoining the Baldwins and their agents from collecting the judgment of June 23rd (No. 21, R. 241).

In this connection we again call attention to *Baldwin v. Iowa Travelling Men's Association* (283 U. S., 522) cited at pages 19 and 26 of our brief (No. 21), for we believe the record before this Honorable court discloses a state of facts in direct conflict with the rule therein announced.

Turning to page 18, counsel stated as follows:

> "From the instrument itself"—to use the canon of interpretation laid down by the Supreme Court of Idaho to determine the obligations of the "undertaking" (R. 51)—one would never dream that there was a $19,573.70 judgment against *Anderson;* but only that there was such a judgment against the *Singer Co.*

This paragraph, we believe, answers itself. If, as counsel contends, the supersedeas is so ambiguous and unintelligible that "from the instrument itself one would never dream there was a judgment against Anderson but only a judgment against the "Singer Company" then certainly such a statement is a tactit ad-

mission that some judicial determination of the liability created by the bond must be had. That being the case, under Section 7155 Idaho Compiled Statutes, the District Court of the Third Judicial Court of the State of Idaho in and for the County of Ada, that being the court in which the bond was filed (it being an Idaho contract and being a court of original jurisdiction under the Constitution of Idaho, Article V, Section 20).*

and the supersedeas itself providing as it does, that judgment might be entered upon motion, we submit that the trial court which entered the judgment was the only court, under the constitution and laws of Idaho having jurisdiction to pass upon the Surety Company's liability.

In this connection, we call attention to the fact that the Statute, Section 7155, as well as the bond itself, provides that if payment is not made "within 30 days" after the filing of remittur judgment may be entered. No reference is made to notice, for the Idaho statutes provide that where notice is required, five days shall be allowed.

From this we believe that if the trial court which entered the judgment did not have jurisdiction then the mere giving of notice could confer no greater rights or powers upon the court than the bond itself in which

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*Idaho Constitution, Article V, Section 20: "Jurisdiction of District Court. The District Court shall have original jurisdiction in all cases, both at law and in equity and such appellate jurisdiction as may be conferred by law."

event the Baldwins would be denied their day in court and their right to litigate the liability of the Surety Company despite the express obligation of the bond that if the said judgment (which at the time of the filing of the bond was joint and not joint and several) or any part thereof be affirmed the Surety Company would pay.

At this point we cannot avoid inquiring of counsel what part of the judgment was subject to execution when the notice of appeal recites that "the defendants * * * hereby appeal * * * from that certain judgment and from *the whole thereof*", and the *supersedeas recites that its purpose is the "staying* the execution of said judgment *so appealed from* "and thereafter recites that if the said judgment appealed from *or any part thereof be affirmed* * * *"' the the judgment will be paid. The whole judgment, we submit, includes each and every part.

Turning to page 29 of the Surety Company's brief, counsel have, we believe, through their own argument, run squarely counter to the long line of decisions of this Honorable Court, cited at pages 8 to 18 of the brief of petitioners (No. 21) when they say:

> "But the Surety Co.'s 'understaking' did not give to the Idaho courts jurisdiction over the Surety Co.'s person to render an ex parte judgment conclusive and beyond attack, if it should ultimately be held that the Idaho courts' ex parte construction of the 'undertaking' was erroneous."

In other words, counsel apparently concede that at most the Surety Company's only contention is

that the trial court committed *error* in the entry of judgment which the Supreme Court of Idaho has held could be corrected if actually existing only upon appeal, and from which it follows that the question of jurisdiction upon which the Surety Company's only claim of denial of process is predicated, must necessarily fall by the wayside.

This paragraph we believe, fully answers the Circuit Court of Appeals inasmuch as the Surety Company in the final analysis complains only of error, which this Court has repeatedly held lower courts might not review. See *Lyon Bonding Company* v. *Karatz* (262 U. S. 77), where it is stated that; "Lower Federal courts are not superior to State courts."

In closing we cannot forego calling attention to page 31 wherein counsel refer to the "*State Court's queer decision on procedure*", and thereafter say "*even if the Surety Company had appealed, no one knows what the Idaho court would have done and the record on such appeal would have been a purely ex parte record, cleverly contrived by Mr. Ailshie in the absence of the Surety Company to support if possible the judgment he had obtained.*"

It is indeed remarkable that a litigant should seek to excuse his failure to appeal because, "no one knows what the Idaho court would have done * * *."

The foregoing statement of counsel is equally remarkable when it is recalled that the Surety Company lays great stress upon the dissenting opinion of Judge Budge and in the same breath, complain of the ex parte record on appeal, whereas Judge Budge uses the following language:

"In the majority opinion it is held that the lower court had jurisdiction to enter the judgment upon the supersedeas bond and that its action in this regard is not subject to be reviewed by notice and motion, but on appeal. This position to my mind is not tenable. This Court has now before it the *identical record it would have,* had an appeal been taken."

No Federal Question Raised by American Surety Company.

The records of this Court disclose that following the filing of the Surety Company's petition for writ of certiorari to the Supreme Court of Idaho (No. 3, October term, 1932, No. 494, October term, 1931), The Baldwins moved to dismiss the petition upon two grounds, Point No. 1 of which was based upon the fact that the decision of the Supreme Court of Idaho was not a final determination, by reason of the Surety Company's pending appeals in the Supreme Court of Idaho; Point No. 2 being as follows:

II.

That no Federal question is involved or properly raised in this Honorable Court as is disclosed by the following portions of the record:

(*a*) The original motion of the surety company (R. 22-24) discloses that no Federal question or claim of denial of due process of law was raised in the trial court.

(*b*) The opinion of the Supreme Court of Idaho (R. 46-54) discloses that no Federal ques-

tion was presented to the Supreme Court of Idaho.

(*c*) No attempt was made to raise any Federal question in any manner until after the decision of the Supreme Court of Idaho, May 2, 1931, when it was raised for the first time by petition for rehearing (R. 68). (Record citations are to No. 3.)

In view of the fact that the records do not disclose a specific denial of this motion, we most respectfully call attention to the fact that the Surety Company chose as its forum the State Court in which to litigate the question of jurisdiction and not until more than one year after the entry of judgment did it file its bill in Federal Court, seeking to enjoin the collection of the judgment and asserting the protection of the "due process" clause of the Federal Constitution.

DUE PROCESS NOT RAISED IN STATE TRIAL OR SUPREME COURTS UNTIL PETITION FOR REHEARING.

Of the greatest significance, we believe, is the fact that the American Surety Company, after selecting the forum in which it chose to litigate the question of jurisdiction, in its motion to declare the judgment void, which is the only matter before this Honorable Court in case No. 3 (No. 3, R. 22), made no assignment or suggestion that its Federal Constitutional rights had been violated by the entry of the judgment of June 23d and *no Federal question is mentioned in that motion or was ever asserted, argued or discussed*

by the Surety Company in the State Trial Court or in the Supreme Court of Idaho until after the decision of the Supreme Court of Idaho when the suggestion was first made in the dissenting opinion of Judge Budge and was thereafter raised for the first time by the Surety Company in its petition for rehearing (No. 3, R. 72).

In addition to the record and as proof of the correctness of the foregoing statement, we call attention to page 6 of the petition of the American Surety Company for writ of certiorari, October term, 1931, No. 494, where it is said:

> "Upon the rendition of the decision of the Idaho Supreme Court, Petitioner promptly moved for rehearing and raised the Constitutional question,"

and thereafter counsel cites *Missouri ex rel. v. Gehner*, 281 U. S. 313, wherein it is stated:

> "It is well settled that this court will not consider questions that were not properly presented for decision in the highest court of the State. Ordinarily, it will not consider contentions first made in a petition to the State Court for a rehearing where the petition is denied without more."*

For their failure to sooner raise the question, counsel, upon page 7 of the petition, say:

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*The Surety Company's petition for rehearing was denied by the Supreme Court by formal order without comment, and without dissent on the part of any Justice (No. 3, R. 117).

> "Petitioner was not bound to anticipate in advance of the decision of the Supreme Court of Idaho that it would declare the hitherto unheard of doctrine that the mere execution of a supersedeas bond for the Singer Company, (even if it presented the question whether the Surety Company became surety for Anderson), amounted to a consent that such question be determined *ex parte* and prevented the Surety Company from attacking the *ex parte* judgment as void for lack of jurisdiction."

This statement seems to us to be so inconsistent with the position now taken by the Surety Company and so absolutely out of harmony with the holdings of the Supreme Court of Idaho that we call attention to two matters we believe to be of grave importance: First, at the time it selected its forum and determined to litigate the question of jurisdiction the Surety Company had knowledge of the actual existence of the judgment of June 23d, and the Surety Company should not be heard to say that it was not bound to anticipate the decision which actually existed. Therefore, in litigating the issue of jurisdiction it was encumbent upon the Surety Company to litigate and present every reason upon which it decided to rely in having the judgment declared void.

We submit that this matter falls squarely within the rule of *Citizens Nat'l Bank* v. *Durr*, 257 U. S. 99, 106. This is not an instance of a decision which could not have been anticipated. The very question at issue was the jurisdiction of the lower state court. This petitioner, by asserting that the judgment was void, itself was the author of that question. Surely, a liti-

gant should be bound to anticipate an adverse decision as well as one favorable to him; and surely, it is his duty, where he himself takes the initiative, as here, to present in support of his own proposition those matters of law, whether constitutional or statutory, upon which he expects to rely.

Second, the suggestion that the Surety Company was not bound to anticipate a decision to the effect that mere execution of a supersedeas amounting to a consent that the question be determined *ex parte* prevented the Surety Company from attacking the judgment as void for lack of jurisdiction, has no foundation in the record, for the opinion of the Idaho Supreme Court discloses upon its face that the court did not hold that the Surety Company was *prevented* from attacking the judgment as void, but merely held that the trial court erred in holding that the judgment of June 23rd was actually void. In other words, the Surety Company *had the right to litigate the issue of jurisdiction* through the medium of its motion to vacate and annul and the Supreme Court simply held that the Surety Company was wrong in its contention and that the trial court erred in following that contention. In this connection we believe that a comparison of the decision of Judge Wilbur, who wrote the opinion of the Circuit Court of Appeals, dated January 18, 1932, and the opinion of Judge McNauton, the writer of the opinion of the Supreme Court of Idaho dated May 2, 1931, will fully answer counsel's argument and will also disclose the error of the Circuit Court of Appeals of which we complain. For convenience, we set out the pertinent portions of the two opinions, side by side:

Opinion of Judge Wilbur, January 18, 1932.

"This decision was based on the proposition that the trial court had no jurisdiction to set aside its judgment under the circumstances and that the remedy of the surety company was by an appeal from the judgment." (No. 21, R.252.)

"When it applied to the State district court to have the judgment vacated, it might have been bound by an adverse decision of that court if one had been rendered were it not for the fact, *as subsequently determined by the Supreme Court of the State, that the District Court of the State had no jurisdiction to consider the question at all;* that the Supreme Court of Idaho alone had jurisdiction to correct the error on appeal." (No. 21, R. 263.)

Opinion of Idaho Supreme Court, May 2, 1931.

"We find the trial court, upon the motion for judgment on the bond, had jurisdiction of the parties and jurisdiction of the subject-matter; that an issue was presented and it had jurisdiction to construe the undertaking and decide the issue which its judgment assumes to decide. It follows the judgment was not void, even if erroneous in the construction, and that *the trial court committed error in anulling and vacating it as void.*" (No. 21, R. 56.)

In the foregoing opinions it will be noted that even Judge Wilbur refers to the correction of *error*, which, as we have heretofore said, is in the final analysis the gist of the contention made by the Surety Company. However, the Surety Company when it filed its motion to vacate and annul the judgment, did not claim *mere error* but asserted that the judgment was absolutely void and this Honorable Court is now asked in the face of this record to hold that the Surety Company's claim of *error* amounts to a denial of *due process of law.*

Conclusion.

The Surety Company assumes without argument or citation of authority that it was in no wise liable on the supersedeas. The authorities, however, illustrate the fact that there was a serious and substantial ques-

tion presented to the Trial Court for construction of the contract, as disclosed by the following:

In 2, Ruling Case Law, page 312, it is said:

> "On general principles it is obvious that if the entire judgment of the lower court is reversed, no action will lie on the bond; but the judgment may be affirmed in part and reversed as to part, and the question then arises as to whether there has been an affirmance. If the provision is to pay the judgment if affirmed in whole or in part there can be no question as to the liability on the bond if the judgment is affirmed in part. And if there are several defendants and the judgment against them is reversed as to some and affirmed as to others, the prevailing doctrine is that the sureties are liable on the bond."

A case most nearly in point, in which the contention which the surety company now presents was held to be without merit, is *Thomas* v. *Lee et al.*, 74 Wash. 286. In that case plaintiff obtained a joint judgment against D. H. Lee, G. W. Lee and Anna Lee. The notice of appeal was given by all of the defendants but the bond was signed only by D. H. Lee and G. W. Lee as principals. The bond, however, recited:

> "that, whereas, the above-named A. T. Thomas * * * recovered judgment against the above-named defendants, * * * now, therefore, if the above-named principals, D. H. and G. W. Lee, shall pay to A .T. Thomas * * * all costs and damages * * * not exceeding the sum of $200, and shall satisfy and perform the judgment or order appealed from in case it

> shall be affirmed, and any judgment or order which the Supreme Court may render or make, * * * then this shall be void * * *."

Motion to dismiss the appeal was made upon the ground that one of the defendants, namely Anna Lee, did not join as a principal in the bond, and that the bond affirmatively showed she was not named in and did not sign as a principal. In considering this question the Supreme Court of Washington said:

> "The bond is conditioned to pay the judgment; the objection therefore, goes to the form rather than to the substance of the undertaking. We think the bond fairly indicates that it is given on behalf of all the appellants, and is within the spirit, if not the letter, of the case of *Fidelity & Deposit Company* v. *Seattle, Renton & Southern R. R. Co.*, 50 Wn. 391, 97 Pac. 453. The only interest respondent can have in the bond is whether a recovery can be had upon it. No objection could be made by the surety under the principle announced in *Yost* v. *Empire State Surety Company*, 69 Wn. 397, 125 Pac. 167. The motion to dismiss the appeal is denied."

We call particular attention to the following statements from that opinion:

> "The bond is conditioned to pay the judgment * * *,"

and:

> "The only interest respondent can have in the bond is whether a recovery can be had upon it."

Following the reasoning of the Supreme Court of Washington, the condition of the bond at bar is that:

> "If the said judgment appealed from, or any part thereof, be affirmed,"

it will be paid, and stronger even than the Washington case is the "staying the execution of said judgment". This case is cited with approval in *Dibert* v. *Peterson et al.*, 83 Wash. 479, wherein a notice of appeal was given by all of the appellants but the supersedeas bond was not signed by one. In passing upon this question it was said:

> "A notice of appeal was given by all of the parties plaintiff. The bond was not signed by Anna Dibert, the wife of Herman Dibert, Caroline Dibert and Herman Dibert. It is in form a supersedeas. No objection was made to the form of the bond in court below.
>
> The motion is denied under the authority of *Thomas* v. *Lee*, 74 Wn. 286, 133 Pac. 446."

Thomas v. *Lee, supra,* was again approved in *Rupe* v. *Kemp,* 99 Wash. 371, where it was said:

> "The policy of the law, that one for whose benefit a bond is given shall not be denied because of any technical informality in the bond, has been evidenced by many statutes passed in this state. (Remington Code, Sec. 777, 1413 and 8327) and declared in several decisions of this court. The only interest respondent can have in the matter is to insure a bond upon which a recovery could be had. Neither appellant, nor his surety, could defeat a recovery by a plea of defect in form. The bond is sufficient. *Thomas* v. *Lee* * * *."

In harmony with the foregoing is *Wood* v. *Orford et al.*, 56 Cal. 157. In this case plaintiff obtained a joint judgment against Mary J. Orford and Robert Orford from which defendants jointly appealed resulting in an affirmance as to Mary J. Orford and a reversal as to Robert Orford. Suit was brought on the bond, the pertinent part of which was as follows:

> "That if said judgment appealed from, or any part thereof, be affirmed, or the appeal dismissed, the appellant will pay in gold coin the amount directed to be paid by the judgment or order, or the part of that amount, as to which the same shall be affirmed."

The court will note that in the foregoing clause the singular "appellant" is used. In passing upon this question the Supreme Court of California held that by guaranteeing the payment of all or any part of the judgment as to which an affirmance should be given, the sureties became as much the sureties of Mary Orford as for her husband, and that by staying the execution of the judgment, the stay operated for her as well as for him. The court there said:

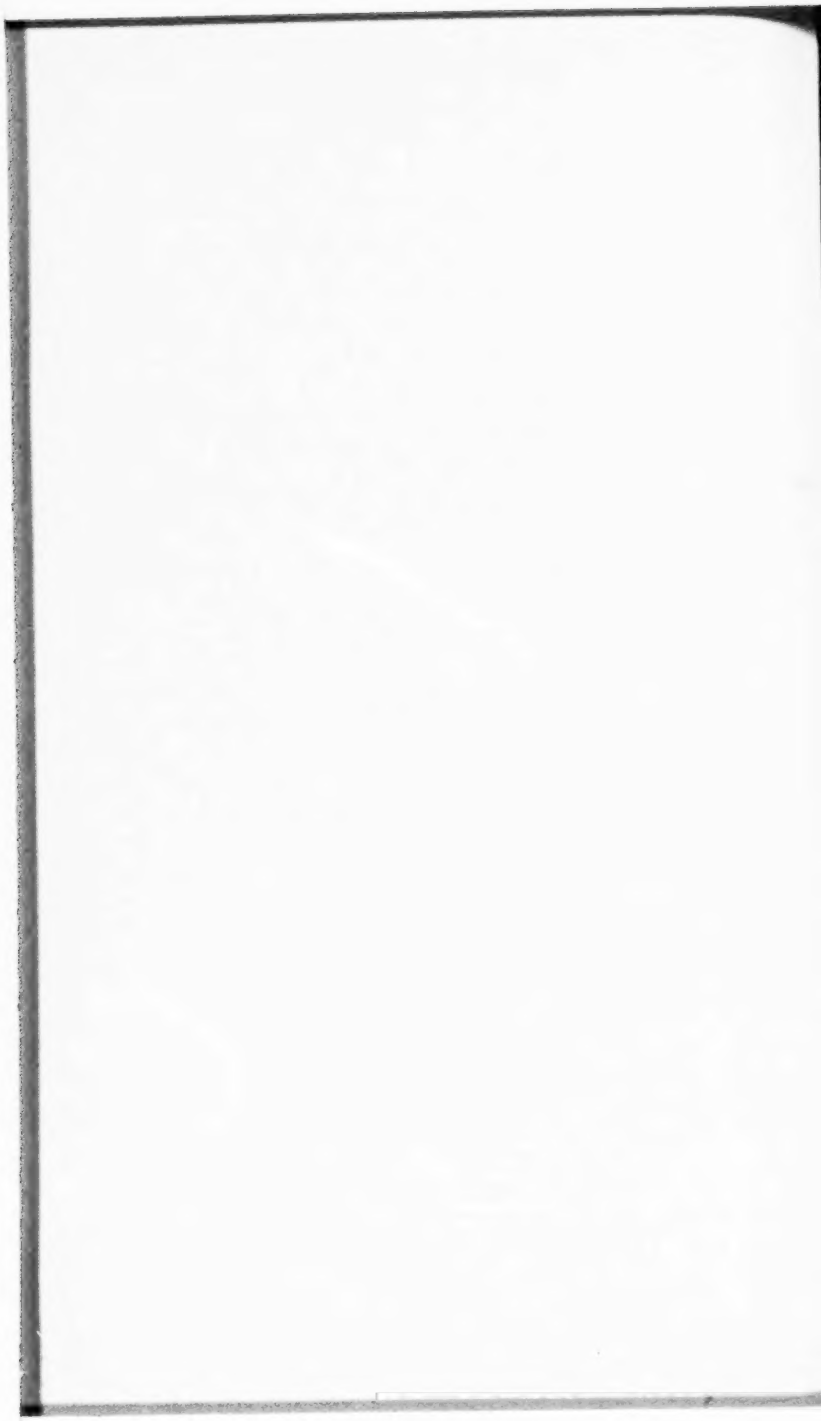
> "We do not think that this point is well taken. Clearly, the judgment was affirmed in part, viz: as to that part which was against Mary J. The defendants Orford and Orford jointly took the appeal; the sureties were as much for Mary J. as for Robert Orford; the undertaking was given to stay execution against her as well as against them. If he alone had appealed and given a bond, execution could have issued as to her; but the sureties undertook, on her behalf,

that if execution be stayed pending the appeal, she should pay whatever of the judgment should be affirmed on the appeal. Judgment affirmed."

WHEREFORE it is prayed that the judgment of the Supreme Court of Idaho be affirmed or that the writ directed to that court be dismissed, and that the judgment of the United States Circuit Court of Appeals for the Ninth Circuit be reversed.

Respectfully submitted,

JAMES F. AILSHIE, JR.,
J. R. SMEAD,
Counsel for Vivian F. Baldwin, et al.



Nos. 3 and 21.

FILE
DEC 23 19
CHARLES ELMORE

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1932.

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AMERICAN SURETY CO.,
Petitioner,

vs.

VIVIAN F. BALDWIN, *et al.*

On Writ of Certiorari to the Supreme Court of Idaho.

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vs.

AMERICAN SURETY CO.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

PETITION OF AMERICAN SURETY CO. FOR REHEARING.

WILLIAM MARSHALL BULLITT,
ALLAN C. ROWE,
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The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

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PETITION OF AMERICAN SURETY CO. FOR REHEARING.

The American Surety Company petitions for a modification of the opinion and for rehearing in these cases for the following reasons:

No. 3.

The opinion delivered November 14, 1932, by Mr. Justice Brandeis says (p. 3):

> "The certiorari granted in No. 3 to review the judgment rendered by the Supreme Court of Idaho on May 2, 1931, must be dismissed *for failure to make seasonably the federal claim.* * * * The Baldwins appealed to the Supreme Court of Idaho, and upon the presentation of their appeal *no federal question was raised* by either party. The Supreme Court on May 2, 1931, reversed the order vacating the judgment. * * * The Surety Company petition for a rehearing. *In that petition* besides reiterating several of its previous contentions, *it urged, for the first time,* that the rendition of the judgment on its undertaking violated the due process clause of the Fourteenth Amendment. The petition was denied without opinion. The federal claim there made cannot serve as a basis for review by this Court."

On May 2, 1931, when the Supreme Court of Idaho delivered its opinion, referred to in the foregoing quotation, one of the Judges, Budge, *J.*, dissented, closing with the following paragraph (R. 63):

> "No other result can follow from the holding of the majority than a miscarriage of justice, and *it is repugnant* to both the State and *Federal Constitutions* in that the Surety Company is deprived of its property without due process of law."

Does not that demonstrate that the Federal question was considered by the Supreme Court of Idaho when one of its Justices dissents on the ground that the majority holding is *repugnant* to the "due process" clause of the *Federal* Constitution?

As this Court's decision dismissing the Certiorari in No. 3 was expressly and solely based upon the Surety Company's failure to seasonably make the Federal claim, it would ap-

pear that this Court was in error in saying that the Federal question had never been presented on the first appeal. It is, of course, conceivable that the Surety Company's counsel did not raise the question on the appeal (the record is silent as to that), and that the dissenting Judge, BUDGE, *J.*, raised the question himself. In any event it is clear that it was *in fact considered* by the Supreme Court of Idaho.

The matter is called to the attention of the Court, in order that it may correct the opinion or alter its conclusion, if it so desires.

No. 21.

The opinion of Mr. Justice Brandeis says (p. 5):

> "the federal remedy was barred by the proceedings taken in the state court which ripened into a final judgment constituting *res adjudicata*."
>
> "The Surety Company was at liberty to resort to the federal court regardless of citizenship, because entry of the judgment without notice, unless authorized by it, violated the due process clause of the Fourteenth Amendment, * * * And it was at liberty to invoke the federal remedy without first pursuing that provided by state procedure * * *. But an adequate state remedy was available; *and having invoked that and pursued it to final judgment, the Surety Company cannot escape the effect of the adjudication there.*"

While that statement is undoubtedly sound, has not the court possibly overlooked two important facts which renders it inapplicable to the instant case?

(1) The Surety Company did not invoke and pursue the adequate remedy available in the state court.

The only remedy available to the Surety Company in the state courts was by way of appeal from the *ex parte* judgment of June 23, 1930.

The Surety Company attempted to pursue a remedy which the Supreme Court of Idaho has held was non-existent. The

Surety Company did not pursue the only available state remedy and there has been no adjudication of the Supreme Court of Idaho thereon.

(2) All that the Supreme Court of Idaho adjudicated was:

(a) that by filing the supersedeas The Idaho District Court acquired jurisdiction over the person of the Surety Company.

(b) that the Idaho District Court had no power to set aside its ex parte judgment of June 23, 1930.

(c) that the sole remedy of the Surety Company was by way of appeal from the ex parte judgment.

These matters are *res adjudicata* between the Surety Company and the Baldwins; and all courts, Federal as well as state, are bound by them.

Granting that the state court had jurisdiction of the parties; that the Surety Company had a remedy in the state court which it had failed to pursue and that it had attempted to pursue a different but not-existent remedy, it is respectfully submitted that it was still *"at liberty to invoke the federal remedy without first pursuing that provided by state procedure"* (Opinion Mr. Justice Brandeis, top of page 6).

It is respectfully submitted that it cannot be said that an *abortive* attempt to pursue a *non-existent* state remedy, is the legal equivalent of invoking an adequate state remedy that may be available.

This court clearly holds that the mere existence of an adequate remedy in the state courts does not prevent the filing of a bill in equity in the Federal courts to enjoin the enforcement of an unconscionable judgment rendered in the state court.

How does the existence of such remedy in the state court bar the filing of the bill in the Federal courts, where the complainant has mistakenly attempted to pursue a different *non-existent* state remedy? After the state courts held that the remedy attempted did not exist, the complainant in the Federal court apparently is in the same position, as far as

the existence of a state remedy is concerned, as if he had never gone into the state courts at all. The state remedy exists, but its existence does not affect the right to Federal relief.

Respectfully submitted,

WILLIAM MARSHALL BULLITT,
ALLAN C. ROWE,
Counsel for American Surety Company.

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

WILLIAM MARSHALL BULLITT,
ALLAN C. ROWE,
Counsel for American Surety Company.